94-123

Before the

Federal Communications Commission

Washington, D.C. 20554

In re	)
	)
Constitutionality of	)
Section 73.658(k)	)
of the Commission's Rules	)
("Prime Time Access Rule")	)

To: The Commission

OPPOSITION OF ACT, ET AL., TO PETITION FOR DECLARATORY RULING

Henry Geller
Donna Lampert

Suite 300
1776 K Street, N.W.
Wash., D.C. 20006
(202) 429-7360

May 7, 1990

SUMMARY

The petition of First Media relies upon the holding in the fairness doctrine case, Syracuse Peace Council, that because of technological developments, governmental regulation imposing substantial burdens on the editorial discretion of broadcasters is no longer necessary to ensure public access to diversity and is therefore unconstitional. First Media is correct in arguing that the holding is applicable to the Prime Time Access Rule (PTAR). However, we strongly urge the Commission to overrule the above holding and on that ground to reject the petition.

We stress that the holding is applicable to every public service content regulation or requirement of the Commission or the Act -- equal time, reasonable access for candidates for Federal office, community issue-oriented programming. In every instance, a broadcaster could cite the ruling and assert that the requirement is unconstitutional because it interferes with editorial discretion and the interference is unnecessary in light of programming diversity (including in the particular category involved). In effect, the Commission has overruled the allocational scarcity basis of the Act (and Red Lion), holding that overall numbers of media outlets render nugatory spectrum scarcity.

The Commission has never issued a more astonishing, a more perverse, or a more emasculating holding than the one in question, here relied upon by First Media. Until it is overruled, it will wholly undermine Commission process in the broadcast field.

Before the
Federal Communications Commission
Washington, D.C. 20554

In re	)
	)
Constitutionality of	)
Section 73.658(k)	)
of the Commission's Rules	)
("Prime Time Access Rule")	)

To: The Commission

OPPOSITION OF ACT, ET AL., TO PETITION FOR DECLARATORY RULING

On April 18, 1990, First Media Corporation, licensee of WCPX-TV, Orlando, Florida, submitted a petition requesting a declaratory ruling that the Prime Time Access Rule (PTAR) will no longer be enforced because it violates the First Amendment based on the holding in the Syracuse Peace Council (fairness doctrine) case.[1] Action for Children's Television (ACT), Henry Geller, and Donna Lampert hereby oppose the petition. We do not assert that First Media's argument is not correct in asserting that the holding in Syracuse Peace Council compels a similar holding of unconstitutionality as to PTAR. Rather, our position is that the holding in Syracuse Peace Council is flagrantly wrong and should be overruled by the Commission. The grounds for this position are stated below.

ARGUMENT

The Commission held that the fairness doctrine is facially unconstitutional on two main grounds: (1) its chilling effects (not pertinent here); and (2) "[b]ecause the fairness doctrine

---

[1] Syracuse Peace Council, 2 FCC Rcd 5043 (1987), recon. denied, 3 FCC Rcd 2035 (1988), aff'd sub nom., Syracuse Peace Council v. FCC, 867 F.2d 654 (D.C. Cir. 1989), cert. denied, 107 L. Ed. 2d 737 (1990).

imposes substantial burdens upon the editorial discretion of broadcast journalists and, because technological developments have rendered the doctrine unnecessary to ensure the public's access to viewpoint diversity, it is no longer narrowly tailored to meet a substantial government interest and therefore violates the standard set forth in [FCC v.] League of Women Voters [, 468 U.S. 364, 380 (1984)]" (2 FCC Rcd at 5052, par. 60).[2] First Media relies on this second holding, pointing out that in light of all the technological developments, there is so much diversity that it is no longer necessary to interfere with the broadcaster's editorial discretion in the manner PTAR does.

We do not dispute the applicability of this second holding to content regulation such as PTAR.[3] Indeed, upon reconsideration and review before the Court of Appeals, we strongly argued that this holding would render unconstitutional the entire public trustee or fiduciary scheme. Whatever the requirement -- equal time, reasonable access for Federal candidates, provision of a reasonable amount of community issue oriented programming (including children's fare), etc., a broadcaster could cite the holding and assert that the

---

[2] The Court did not affirm the Commission upon the basis of either of these two grounds. See 867 F.2d at 665.

[3] That PTAR involves content regulation is shown by the consideration that it seeks to promote presentation of local and first run syndicated programming (over network or off-network fare), but with specific exemptions for other favored categories such as children's programming, public affairs, or news documentaries. Indeed, the categories raise difficult definitional problems under the First Amendment. See NAITPD v. FCC, 516 F.2d 526, 535-42 (2d Cir. 1975).

requirement is unconstitional because it interferes with editorial discretion and the interference is unnecessary in light of technological developments affording an abundance of programming diversity (including in the particular category involved). In effect, the Commission, contrary to its own holding, has overruled the allocational scarcity basis of Title III of the Communications Act (and thus Red Lion Broadcasting Co. v. FCC, 395 U.S. 367 (1969)), holding that overall numbers of media outlets render nugatory spectrum scarcity.

Rather than repeat the arguments already made, we have attached the pertinent portion of our brief as an appendix hereto. We again strongly urge the Commission to overrule the holding (2) quoted above. Otherwise it will continue to bedevil the Commission in the case of every public service content requirement. If the Commission seeks to proceed against some broadcaster for failure to present any community issue oriented programming or children's programming or to afford equal time or reasonable access[4], the Commission will be met by its own holding that Governmental intrusion to require such programming is no longer necessary in light of the abundance of electronic media outlets and thus is unconstitutional.

---

[4] The Commission will of course hold that in the case of statutory requirements, it cannot hold any provision of its organic act unconstitutional. But that will simply shift the matter to the court of appeals, where the Commission will be called upon to either defend the statutory provision (and thus to overrule the holding) or to concede on appeal that the provision is unconstitutional on the basis of the holding. Either way the Commission must consider the dilemma it has created for itself.

In short, we believe that in the long history of administrative rulings by the Commission, it has never rendered a more astonishing, a more perverse, or a more emasculating holding than the one in question, here relied upon by First Media. Until it is overruled, it will wholly undermine Commission process in the broadcast field.

CONCLUSION

For the foregoing reasons, we urge the Commission not to grant the petition of First Media but rather to deny it upon the basis that the holding relied upon ((2) quoted above) is overruled.

Respectfully submitted,

Henry Geller

Donna Lampert

Suite 300
1776 K Street, N.W.
Washington, D.C. 20006
202-429-7360

May 7, 1990

APPENDIX

Excerpt from brief of Petitioners Geller & Lampert in Syracuse Peace Council, 87-1516

I. The Commission has wiped out the public trustee basis of the broadcast scheme, contrary to clear Congressional and Court directives.

1. The broadcast licensee is a public trustee or fiduciary.

The basis of the Congressional broadcast regulatory scheme is well established and well known to this Court. We set it out again only because the Commission chooses to ignore or denigrate it.

Radio is inherently not open to all: More people want to broadcast than there are available frequencies, and the Government must choose one entity (or more) and -- to prevent engineering chaos -- enjoin all others from using the frequency. This scarcity -- based not on the number of outlets or a comparison of broadcast outlets with other media but on the number of those who seek broadcast frequencies compared to the number of frequencies available[2] -- is the "unique

---

[2] See Red Lion, supra, 395 U.S. at 388, 390, 399; Fairness Report, 48 FCC 2d 1, 4 n.4 (1974). See 1987 Decision, 2 FCC Rcd at 5055, at par.78, J.A. 43. This is shown by the continuing large number of comparative hearings involving multiple applicants for the same broadcast facilities (e.g., 142 pending as of November 1986); by the record selling prices for stations, far exceeding the stations' value in assets and reflecting the scarcity of the license ($510 million for a VHF in Los Angeles; $450 million for one in Boston; $136 million for a Chicago UHF; $44 million for an FM station in Los Angeles); by the demands of land mobile for UHF broadcast frequencies and resistance of the broadcasters, claiming they need this spectrum for High Definition Television. See S. Rept. No. 100-34, on S.742, 100th Cong., 1st Sess., at 21-23 (1987) (herein 1987 S.Rept.). See also H. Rept. No. 100-108, on Fairness in Broadcasting Act of 1987, 100th Cong., 1st Sess., at 13-18 (1987) (herein 1987 H. Rept.), for further delineation of this continuing scarcity.

characteristic" of radio that supports its regulatory scheme.[3] It is undisputed that this same scarcity -- more people wanting to broadcast than there are available frequencies -- exists today.

In conferring these scarce privileges, the Government could have required the licensees to operate as common carriers. Or, it could have auctioned the frequencies and used the resulting money to support public broadcasting facilities or the production and presentation of programs by all public groups of a demonstrated size, as in the Netherlands.[4] Or, as Mr. Justice White pointed out in Red Lion, supra, 395 U.S. at 390-391, "[r]ather than confer monopolies on a relatively small number of licensees, in a Nation of 200,000,000, the Government surely could have decreed that each frequency should be shared among all or some of those who wish to use it, each being assigned a portion of the broadcast day or the broadcast week."

The Government instead decided upon a public interest licensing scheme. The broadcast applicant pays no money for this scarce privilege. But it receives no property right in the frequency (see Section 309(h), 47 U.S.C. 309(h)) -- "no right to an unconditional monopoly of a scarce resource which the Government has denied others the right to use." Red Lion, at 391. Rather, to protect the First Amendment rights of these

---

[3] See NBC v. U.S., 319 U.S. 190, 226 (1943).

[4] See 1987 S. Rept., supra, at 13 for still other alternatives.

others, the broadcaster receives only a short term license and volunteers to serve the public interest -- to be a "fiduciary" for its community. Id. at 390.

The decisions of the Supreme Court to this effect are numerous.[5] So also are the decisions of this Court. See UCC III, supra, 707 F.2d at 1427-28, n.38 ("Certainly the 'public trust' model has long been accepted by this court ...[citations omitted]").

2. The Commission's action eliminating the fairness doctrine undermines the whole notion of a public fiduciary, and unravels the public trustee scheme.

***

~~It follows that the Commission must act consistently with~~

---

[5] In addition to the Red Lion and NBC cases cited above, see, e.g., FCC v. League of Women Voters, supra, 468 U.S. at 377, 381; CBS, Inc. v. FCC, 453 U.S. 367, 395, 397 (1981); FCC v. NCCB, 436 U.S. 775, 799 (1978); CBS, Inc. v. DNC, supra, 412 U.S. at 111.

The Commission cites the League of Women Voters case, at ns. 11 and 12, as inviting re-examination of the public trustee/fairness concept. First, the actual holding of the case reaffirms the concept. See 468 U.S. at 392. Second, we have already shown that there is no basis for setting aside the concept as to scarcity. See n. 2, supra. We address the alleged chilling effects of the fairness doctrine in Point II, infra. Significantly, the Commission does not challenge the general requirement of operation in the public interest -- the public trustee concept. See 1987 Decision, 2 FCC Rcd at 5048, 5055 n.101, par. 81, J.A. 43. Finally, the only changes that have occurred since the Supreme Court's consideration of the concept have been substantial alleviation of burdens on the broadcaster. See Radio Deregulation, 84 FCC 2d 968 (1981), rev'd and remanded on only one ground, Office of Communication of the United Church of Christ v. FCC, 707 F.2d 1413 (D.C.Cir. 1983) (UCC III); Black Citizens for a Fair Media v. FCC, 719 F.2d 407 (D.C.Cir. 1983), cert. denied, 467 U.S. 1255 (1984) (postcard renewal affirmed); Television Deregulation, 98 FCC 2d 1076 (1984), rev'd and remanded solely on commercialization as to children, ACT v. FCC, 821 F.2d 741 (D.C. Cir. 1987).

90) that under Meredith it must pass on the constitutionality of the fairness doctrine. But all the Meredith Court directed the Commission to do was to consider and decide the merits of the constitutional claim. The Meredith Court itself naturally never reached those merits, and therefore never decided whether fairness is so integral a part of the public trustee scheme that the Commission would be invalidating that scheme. If we are right on that position, then Supreme Court precedent controls, (see Branch, supra) and the Commission cannot find fairness to be unconstitutional.

While we could rest our position on the foregoing analysis, we stress that upholding the Commission's drastic decision will have far reaching consequences on other important public interest requirements. The Commission asserts that it has not affected public interest review at renewal, equal opportunities under Section 315(a), or reasonable access under Section 312(a)(7). See 1987 Decision, 2 FCC Rcd at 5064, n.91, J.A. 25. The Commission is wrong on all counts.

In Red Lion, supra, 395 U.S. at 391, the Court held that "in terms of constitutional principle, and as enforced sharing of a scarce resource, the [fairness] rules are indistinguishable from the equal-time provisions of Sec. 315, a specific enactment of Congress requiring stations to set aside reply time under specified circumstances and to which the fairness doctrine and these constituent regulations are important complements...." Just recently, this Court, in an opinion by Judge Bork, declined

to invalidate the equal opportunities provision on constitutional grounds precisely because of this equivalence, holding that the Red Lion decision on the constitutionality of fairness also controls the constitutionality of equal time. Branch v. FCC, supra, 824 F.2d at 49-50.[12] The FCC, in holding fairness to be facially unconstitutional, has perforce done the same for equal time.[13] We submit that this is not permissible for the agency, any more than it is for this Court. Ibid. But in any event, we stress the pervasiveness of the Commission's holding: It is not confined to the fairness doctrine.

---

[12] The Court noted (ibid.) that the Supreme Court recently reaffirmed Red Lion in FCC v. League of Women Voters, supra, and that while the FCC may have sent a signal "by issuing a [1985] report which concludes that section 315 is unconstitutional and should be abandoned..., ...unless the Court itself were to overrule Red Lion, we remain bound by it."

The Commission seeks to distinguish Branch on the ground that the Court "...did not review the constitutionality of Section 315 in the context of an evidentiary record developed for that purpose." Reconsideration, supra, at n.38, J.A. 90. But the existence or not of an evidentiary record has nothing to do with the point we are making here (and that the Supreme Court and this Court has made): Fairness and equal time are indistinguishable from a constitutional standpoint; if fairness is facially unconstitutional as chilling and interfering with editorial discretion in the context of great technological developments making such interference unnecessary (supra, at 5-6), so also is equal time. Yet the FCC persists in ignoring this obvious parallel.

[13] Indeed, its holding that the fairness doctrine interferes with the editorial discretion of the broadcaster and is no longer necessary to assure viewpoint diversity because of technological development, is equally applicable to equal opportunities. Clearly under this approach a network could present an interview with one candidate (e.g., Mr. Mondale in 1984) and reject any claim for his opponent on the ground that the interview constituted probing journalism and, in its editorial discretion and in light of the abundance of outlets, no reply is in order.

Similarly, the Commission has undermined public interest renewal. Because of the "bedrock obligation contemplated by the 'public interest'," the Commission's focus at renewal is upon only one programming category, community "issue-oriented" programming.[14] In light of the Commission's fairness action, the licensee can now render such broader issue-type programming in a wholly one-sided manner, presenting only views with which it agrees or for which it is paid. But even more significantly, the FCC's action obliterates all public interest renewal. For just as in fairness, the issue-oriented approach substantially interferes with the editorial discretion of broadcasters (who might not want to present such programming) and does so in the face of "technological developments" which render such interference "unnecessary to ensure the public's access to viewpoint diversity." See supra, at 5-6.

Similar considerations apply to the reasonable access provisions of Section 312(a)(7). As shown by the lead case, CBS, Inc. v. FCC, 453 U.S. 367 (1981), there is certainly a clear interference with editorial discretion: The networks did not want to place the Carter/Mondale program in their December, 1979 schedules, and the FCC, implementing 312(a)(7), held that they must do so (and accordingly drop some other program). Ibid. The same diversity claims -- an abundance of broadcast outlets and

---

[14] See Radio Deregulation, supra, 84 FCC 2d at 978, 982, aff'd, UCC III, supra, 707 F.2d at 1426-1430. The community issue-oriented category is broader than controversial issues of public importance, and would appear to include virtually all nonentertainment programming. See UCC III, 707 F.2d at 1431.

new technological developments (e.g., opportunities for candidates to use cable TV, video cassettes, etc.) -- can be advanced.

The Commission thus has not properly focused on the substantial governmental interest that is at stake here. It is not just diversity of views (although for reasons like the WLBT-TV case and those set out in part II, we believe that the fairness doctrine, on balance, promotes such diversity). The fundamental Governmental interest at stake is the Government's requirement that the broadcaster act not in its private interest but rather in the public interest -- that it be a fiduciary for its community. In doing so, the Government believes that not just diversity of views will be advanced but that the public interest in the larger and more effective use of radio and television will be promoted (e.g., nonentertainment needs of the community such as educational children's programming). See Section 303(g), 47 U.S.C. 303(g); NBC v. U.S., supra, 319 U.S. at 215-216. Under the Commission's approach, this concept disappears: The Commission could always assert that there is an interference with the licensee's programming judgment and that it is unnecessary in light of the abundance of broadcast outlets and new technological developments. Under the Commission's approach, the scheme of short-term licenses, and renewal proceedings where the burden is on the licensee to show that it has operated in the public interest, becomes a joke, as shown by the discussion of the WLBT-TV case.

The Commission purports to follow Red Lion and urges overruling the spectrum scarcity base of Red Lion only as dictum. See n.22, infra. But the foregoing analysis shows how confused the agency is: It has held that whenever there is substantial agency interference with the broadcaster's editorial discretion, this is unconstitutional in light of "technological developments" insuring viewpoint diversity without such interference (supra, at 5-6). This means that overall numbers of media outlets renders nugatory spectrum scarcity -- that Red Lion, far from being followed, is overruled and that the entire public trustee scheme is unconstitutional, since time and again it interferes with editorial discretion in the face of "technological developments" affording viewpoint diversity without such agency intervention.

In short, while the Commission glibly asserts that its action is confined to the fairness area and leaves the rest of the Communications Act unaffected, analysis establishes that it is creating havoc in the public interest scheme. Significantly, Chairman John Dingell of the House Energy and Commerce Committee stated that if the fairness doctrine is struck down as unconstitutional, "...I will work for a new regulatory deal for broadcasting which abandons the public trustee model and looks to spectrum fees or auctions;" that while such fees or auctions are not the "best way" to provide public service, there may be "no other choice."[15]

---

[15] Television Digest, March 7, 1988, at 1-2. After rejecting arguments that the doctrine and other content regulation are no longer needed on scarcity grounds or "because